Supreme Court, U.S.
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No. 96-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CORY H. STRINGFELLOW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 3, 1996

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the defendant's breach of a condition of a plea agreement allows the government to then enforce the agreement against the defendant while at the same time withdrawing all benefits to the defendant that the agreement provided for where there is no provision is the agreement allowing the government to do so.

II. Whether the government may withdraw a motion filed pursuant to the United States Sentencing Guidelines § 5K1.1, based upon conduct of the defendant, subsequent to the assistance given by the defendant underlying the motion.

PARTIES TO THE PROCEEDING

Petitioner, Cory H. Stringfellow, is the defendant, appellant in the action appealed to the United States Court of Appeals Tenth Circuit, Case No. 95-1397, from the United States District Court for the District of Colorado, the Honorable Judge Edward W. Nottingham, Case No. 93-CR-9.

Respondent, United States of America, is the plaintiff, appellee in the action appealed to the United States Court of Appeals Tenth Circuit, Case No. 95-1397, from the United States District Court for the District of Colorado, the Honorable Judge Edward W. Nottingham, Case No. 93-CR-9.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Tenth Judicial Circuit in this proceeding.

OPINIONS BELOW

The United States Court of Appeals, Tenth Circuit has issued an Order and Judgment in this case, a copy of which appears in Appendix A to this Petition. This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It will not be published. The United States District Court, District of Colorado, entered a Judgment in this matter on or about September 2, 1995. Case Number 93-CR-9-N, a copy of which appears in Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Order and Judgment of the United States Court of Appeals, Tenth Circuit, was entered on June 5, 1996. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Constitutional and Statutory Provisions:

1. The Fifth Amendment to the United States Constitution which provides in pertinent part as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime. . . . nor be deprived of life, liberty, or property, without due process of law. . . .

2. Section 5K1.1 of the United States Sentencing Guidelines which provides as follows:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered:

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

3. Rule 35(b) of the Federal Rules of Criminal Procedure which provides in pertinent part as follows:

> The court, on motion of the Government made within one year after the imposition of the

> sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense. . . .

STATEMENT OF THE CASE

Statement of Facts

The defendant/appellant, Cory Stringfellow, was charged in a Four Count Indictment filed in the District of Colorado on or about January 7, 1993. The indictment arose out of an investigation by the DEA Denver Metro Task Force beginning in July of 1992. The investigation centered around Mr. Stringfellow and five other individuals both in the Denver area and the Salt Lake City, Utah area. Mr. Stringfellow resided in Salt Lake City. The investigative sources alleged that Mr. Stringfellow was traveling to San Francisco, California approximately once a month in order to purchase "crystal" LSD which he later transferred to blotter paper for distribution. Other individuals were then traveling to Denver where they sold LSD

to a DEA undercover agent.

The Indictment against Mr. Stringfellow included one count of Conspiracy to Possess with Intent to Distribute and to Distribute 10 grams or more Lysergic Acid Diethylamide (LSD), in violation of 21 U.S.C. § 846 and 21 U.S.C., §§ 841(a)(1) and (b)(1)(A). Counts Two, Three and Four were for Distribution of 10 grams or more of Lysergic Acid Diethylamide (LSD), Aiding and Abetting, in violation of 21 U.S.C., §§ 841 (a)(1) and (b)(1)(A) and 18 U.S.C. § 2.

On or about July 20, 1993, Mr. Stringfellow entered a plea of guilty, pursuant to a plea agreement, to Count One of the Indictment: Conspiracy to Possess with Intent to Distribute and to Distribute 10 grams or more Lysergic Acid Diethylamide (LSD). The plea agreement entered into by Mr. Stringfellow and the government provided as follows: (1) The defendant agreed to plead guilty to Count One of the Indictment. (2) The

defendant agreed to fully and truthfully cooperate with the Government and law enforcement authorities, which cooperation included debriefings and truthful testimony before federal grand juries and trial juries whenever called upon or subpoenaed. (3) The government agreed that it would not use against the defendant, either directly or indirectly, any information and testimony given by the defendant in any criminal case except prosecutions for perjury or making a false statement. (4) The defendant agreed that should any statements and testimony given by him pursuant to this agreement prove to be false or intentionally misleading, then any statements and testimony made by him could be used in any prosecution against him. (5) The government agreed to make a motion to dismiss the remaining counts of the Indictment against the defendant after his sentencing on Count One. (6) The government agreed that provided the defendant fully, truthfully, and completely

cooperated with the government and law enforcement authorities, they would, before the sentencing of the defendant on Count One of the Indictment, file a motion pursuant to § 5K1.1 of the Sentencing Guidelines and 18 U.S.C., § 3553(e), recommending a downward departure to a sentence of imprisonment of 84 months. (7) The government agreed that if the United States Sentencing Commission changed the sentencing Guidelines to lessen the penalties pertaining to lysergic acid diethylamide (LSD), then the government would recommend that the Court resentence the defendant in accordance with the change or changes. (8) The government agreed that if the defendant continued to cooperate with the government and law enforcement authorities after the filing of the § 5K1.1 motion, that the government agreed to evaluate that cooperation and, in its sole discretion, consider the filing of a further motion pursuant to Rule 35(b) of the Federal Rules of

Criminal Procedure and (9) The government agreed there would be no adjustment for role-in-the-offense under the facts of the case. The plea agreement did not address how a breach of the agreement by the defendant could affect how the agreement would be enforced.

Sentencing in this matter was initially scheduled for September 17, 1993. On September 16, 1993 the government filed their Motion for Departure Pursuant to Section 5K1.1 of the Sentencing Guidelines and 18 U.S.C. § 3553(e). A Presentence Investigation Report was prepared on Mr. Stringfellow by the U.S. Probation Officer, Denver, Colorado. The Presentence Report computed the offense level pursuant to the 1992 Sentencing Guidelines Manual setting a Base offense Level of 36. The report recommended a two point increase for the defendant's role in the offense as the primary organizer for an adjusted offense level of 38. The report recommended no

upward adjustment for obstruction of justice and further recommended a three point reduction for acceptance of responsibility for a total offense level of 35. The defendant further had a Criminal History Category of I. Based on a total offense level of 35 and a Criminal History Category of I, the guideline range for imprisonment under the Presentence Investigation Report was 168 to 210 months. Based on the plea agreement and the government's agreement to file a motion pursuant to 5K1.1 the presentence report recommended a downward adjustment for a sentence of 84 months and a term of 5 years of supervised release.

After the entering of the plea agreement the defendant continued his release on the previous $25,000 cash bond which was issued on October 13, 1992. However, Mr. Stringfellow did not appear for the September 17, 1993 sentencing as he had left the country for Liverpool, England the day prior to sentencing.

When he did not appear for sentencing a fugitive warrant was issued. The fugitive warrant was assigned to Deputy U.S. Marshal James Richard Phelps of the Salt Lake City office. Although there were some discussions between Marshal Phelps and Mr. Stringfellow's family in an attempt to secure Mr. Stringfellow's surrender, he in fact did not surrender prior to being arrested in Liverpool on March 15, 1995. Mr. Stringfellow waived his right to an extradition hearing and returned to the United States shortly after that time. Sentencing was rescheduled for June 23, 1995. At the June 23 hearing the court took a partial statement from Mr. Stringfellow, however it was determined that the sentencing hearing should be continued in order that a statement from codefendant Jon Stuart could be secured. Stuart's statement was important in making a determination regarding Mr. Stringfellow's role in the offense. For this reason sentencing was continued until July 21, 1995.

At the July 21 hearing testimony was taken from Marshal Phelps and Mr. Stringfellow. The parties stipulated to entering a prior statement of Mr. Stuart in lieu of his testimony. After hearing testimony the court sentenced Mr. Stringfellow as follows. The court set a base offense level of 30 which was based on the amended guidelines' methodology for ascertaining the quantity of LSD used to determine the applicable statutory minimum sentence. There was a two point upward adjustment for the defendant's role in the offense and a two point upward adjustment for obstruction of justice. The court did not make an adjustment for acceptance of responsibility. Mr. Stringfellow's total offense level was 34 with a criminal history category of I for an imprisonment range of 151 to 188 months. The court committed the defendant to the custody of the United States Bureau of Prisons, to be imprisoned for a period of 188 months. He received credit for time served of 135 days. Upon release

from his term of imprisonment. the defendant is to serve a term of four years on supervised release. In the district court's Memorandum of Sentencing Hearing and Report of Statement of Reasons it states that the court is accepting the plea of the defendant and the plea agreement. Further, it requires that the government dismiss the remaining counts of the indictment pursuant to the plea agreement. However, the court does not enforce any of the other provisions of the plea agreement. The district court did not allow for a downward departure pursuant to the plea agreement and in fact the government filed a motion to withdraw their motion for downward departure pursuant to 5K1.1 shortly before the time of sentencing. Although the district court never specifically ruled on this motion, the court erroneously stated at the July 21, 1995 sentencing hearing that:

> The government has, as I understand it, withdrawn (sic) or never filed a motion for departure pursuant to 5K1.1. Consistent with that. I find no reason to depart from the sentence called

for by application of the guideline.

(Transcript of July 21, 1995 at page 46). Neither the government, nor defense counsel corrected the district court as to this statement.

The district court's sentence was appealed to the United States Court of Appeals, Tenth Circuit, in a timely manner. Oral argument was heard in this matter on or about May 16, 1996. On or about June 5, 1996 the Tenth Circuit filed an Order and Judgment affirming the sentence imposed by the district court.

Procedural History and the Rulings Below

The defendant/petitioner in this matter, Cory Stringfellow, was arrested and charged in a Four Count Indictment filed in the District Court of Colorado on or about January 7, 1993. This took place after an investigation by the DEA Denver Metro Talk Force of individuals in both Denver, Colorado and Salt Lake City, Utah. The defendant/petitioner

was charged with one count Conspiracy to Possess with Intent to Distribute and to Distribute 10 grams or more Lysergic Acid Diethylamide (LSD), in violation of 21 U.S.C., § 846 and 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and three counts of Distribution of 10 grams or more of Lysergic Acid Diethylamide (LSD), Aid and Abet, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2.

On or about July 20, 1993, the defendant/petitioner entered a plea of guilty to Count One: Conspiracy to Possess with Intent to Distribute and to Distribute 10 grams or more Lysergic Acid Diethylamide (LSD) pursuant to a plea agreement with the government. As stated above, the plea agreement included, among other things, that the government would file a motion pursuant to United States Sentencing Guidelines § 5K1.1 recommending a downward departure to a sentence of imprisonment of 84 months. Further, the government agreed that

Mr. Stringfellow should not receive an enhancement of sentence based on being a leader, organizer or manager. Sentencing was scheduled before the Honorable Edward W. Nottingham for September 17, 1993. The government filed the Motion for Departure Pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C., § 3553(e) on or about September 16, 1993.

Prior to the September 17, 1993 sentencing date, Mr. Stringfellow left the country and went to Liverpool England. He did not appear for sentencing on the September 17, 1993 date. Mr. Stringfellow was arrested in Liverpool on a fugitive warrant on March 15, 1995. He waived extradition and returned to the United States shortly thereafter. Sentencing was rescheduled in this matter for on or about June 23, 1995. At that time Judge Nottingham took a partial statement from Mr. Stringfellow and then stopped the hearing and continued it to July 21, 1995 in order that testimony from another witness and codefendant

could be made available. At the July 21. 1995 hearing the court heard testimony from Deputy U.S. Marshal Phelps of the Salt Lake City Office regarding the process leading to Mr. Stringfellow's arrest in England, and from Mr. Stringfellow himself. The court further accepted a sworn statement from codefendant Jon Stuart for the purposes of determining Mr. Stringfellow's role in the offense.[1]

After hearing testimony the district court sentenced Mr. Stringfellow to the custody of the United States Bureau of Prisons, to be imprisoned for a period of 188 months with four years of supervised release. The government had filed a motion to withdraw the previous motion for downward departure pursuant to U.S.S.G. § 5K1.1 prior to the final sentencing. Although this motion was never ruled upon specifically, the

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[1] The statement of Mr. Stuart had been in the hands of the government prior to the entry of Mr. Stringfellow's plea of guilty.

district court sentenced Mr. Stringfellow as if that motion had either been withdrawn, or had not been filed in the first place.

Mr. Stringfellow appealed the district court's sentence in a timely manner to the United States Court of Appeals for the Tenth Judicial Circuit. Oral argument was heard in this matter on or about May 16, 1996. The Tenth Circuit entered an Order and Judgment affirming the district court on or about June 5, 1996. In his appeal to the Tenth Circuit Mr. Stringfellow further raised the issue of effective assistance of counsel. The Tenth Circuit dismissed the issue without prejudice due to lack of jurisdiction. That issue is not before this Court for consideration.

REASONS FOR GRANTING WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE CIRCUITS.

It is a well established fact in our system of justice that

"[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 30 L.Ed. 2d 427, 92 S.Ct. 495 (1971). A plea agreement that is properly administered is to be encouraged. It is clear that if every person charged with criminal conduct were to go through a full-scale trial, "the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.* The *Santobello* Court goes on to describe some of the many reasons that a plea bargain may be desirable:

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it

> protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Id. at 261 (*citing Brady v. United States*, 397 U.S. 742, 751-52, 90 S.Ct. 1463, 1470-71, 25 L.Ed.2d 747 (1970)).

Although our system of justice encourages plea agreements in criminal matters, entering into a plea agreement is a "grave and solemn act" on the part of the defendant and must be treated by all of the participants as such. *Brady v. United States*, 397 U.S. at 748 (1970). The *Brady* Court goes on to discuss the seriousness of a plea agreement as follows:

> . . . Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus

> stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so--hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial--a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Id. It is because of this seriousness, because of the waiver of fundamental constitutional rights that the courts have implemented safeguards for the defendant who is about to enter a plea of guilty. The entering of a plea agreement by the defendant is a fundamental example of the importance of our rights to due process as citizens. This is the one situation where an individual freely gives up those rights that this Court, and

society has gone to great lengths to establish, define and protect. It is for this reason, that it is essential that there be consistency among the circuits when it comes to interpreting problems that are brought forth in plea agreements, particularly when the problem at issue addresses the question of what rights does a defendant have when the government disregards important considerations contained within a plea agreement?

When a defendant enters a plea it is required that the plea be voluntary and knowing. Courts regularly go through long dialogues with defendants to make certain this requirement has been met. Further, if the plea was in some way induced by a promise or promises by the government, the essence of those promises must be made clear. *See Santobello* at 498. In this case, the government breached the term of the plea agreement by its withdrawal of the motion for downward departure pursuant to U.S.S.G. § 5K1.1.

In the case at hand, the defendant argues that he entered into the plea agreement on the promise of the government that the 5K1.1 motion would be filed. The defendant cooperated with the government and the motion was in fact filed on September 16, 1993. The motion itself recognizes the great assistance that the defendant had rendered. However, when the defendant did not appear for the initial sentencing and was later apprehended, the government filed a motion to withdraw the 5K1.1 motion. The district court then, without consideration of the motion or any contribution the defendant had made before he absconded, sentenced Mr. Stringfellow to 188 months. In affirming the district court, the Tenth Circuit held that the government fulfilled its part of the bargain, however "before the motion could take effect and the contract could be executed, the defendant failed to carry out his part of the bargain. It is unassailable that by absconding Mr. Stringfellow insured he

could not be called upon to testify." (Order and Judgment at 7). The Tenth Circuit misinterprets the case law of other circuits in holding that the government did not violate the plea agreement by withdrawing the 5K1.1 motion when the defendant absconded and did not testify at later proceedings. Much of the difficulty in these cases surrounds whether a 5K1.1 motion can anticipate future conduct or must be based on conduct prior to the date of filing. The corollary to this is whether 5K1.1 conduct can be held and later included in a Rule 35(b) motion. The issue of when a section 5K1.1 motion should be filed as opposed to when a motion for a reduction pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure should be filed, has been addressed by courts in numerous circuits, however, a consistent answer has never been established. It is because of this confusion that this Court needs to address the issues presented above. Further, there is no consistent language among the

circuits which addresses the issue of whether or not the government may enforce a plea agreement against a defendant in a way that withdraws substantial benefits of the defendant, which are previously earned and acknowledged, yet still enforces the other terms of the plea agreement in the situation where the defendant breaches an aspect of the agreement.

Similar issues to the one at hand have been addressed by the Fourth Judicial Circuit, the First Judicial Circuit and the circuit for the District of Columbia. The opinions of these circuits are not consistent with each other, nor are consistent with the Order and Judgment of the Tenth Circuit in the case at hand. In *United States v. Drown*, 942 F.2d 55 (1st Cir. 1991), the defendant entered into a plea agreement and pleaded guilty to one count of conspiracy to possess with intent to distribute in excess of 500 grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846. After the plea agreement, and prior

to sentencing. Drown provided substantial assistance to the government. However, prior to sentencing Drown fled the jurisdiction. Upon being rearrested, Drown entered into a second plea agreement. However, at the time of sentencing the government refused to file a motion pursuant to § 5K1.1 on the basis that the defendant's cooperation was not complete; that he committed perjury; that he tried to sell marijuana after the agreement had been entered into and that he had fled the jurisdiction. The First Circuit vacated the defendant's sentence and remanded holding that "prosecutorial discretion, while broad, is not entirely untrammeled; and if its exercise is based on unacceptable standards, such as the infringement of protected statutory or constitutional rights, a federal court is empowered to intervene." *Id.* The First Circuit found that a motion pursuant to 5K1.1 deals only with assistant given prior to sentencing and any further assistance should be dealt with by a Rule 35(b)

motion. Dangling a carrot just out of the defendant's reach. by refusing to file a 5K1.1 and postponing the evaluation of a defendant's assistance until the defendants services are complete "improperly merges the temporal boundaries established in section 5K1.1 and Fed R. Crim. P. 35(b), respectively." *Id.* Further. "[c]aution seems particularly advisable, moreover. because a disregard of section 5K1.1's temporal mandate touches upon a criminal defendant's due process rights." *Id.*

The Order and Judgment of the Tenth Circuit is directly in conflict with the First Circuit's ruling. The Tenth Circuit holds that because Mr. Stringfellow fled the country he was in breach of the plea agreement. Even though he had rendered valuable assitance, the fact that he was not available to testify in subsequent trials supports the withdrawal of the 5K1.1. The Tenth Circuit completly misses the point established by the First Circuit. that is that not filing a 5K1.1 on the basis that there is

still cooperation to be obtained, is a violation of the plea agreement and a violation of the defendant's right to due process. This matter is not distinguishable from the *Drown* case for the mere reason that in *Drown* the government still intended to file a motion for a reduction in sentence. This case is in direct conflict with the opinion in *Drown* in that the Tenth Circuit allowed the government to withdraw the benefits of the plea agreement yet still enforce the agreement against Mr. Stringfellow, whereas in *Drown*, the failure to file a 5K1.1 motion was found to be in direct violation of the agreement.

In *United States v. Martin*, 24 F.3d 211 (4th Cir 1995), the Fourth Circuit interrpreted the government's failure to file a motion for downward departure pursuant to § 5K1.1 in substantially the same way as the *Drown* court. The *Martin* court held that the government could not withold the filing of a 5K1.1 for the reason that they were contemplating the filing of

a Rule 35(b) motion at a later time. If the defendant has provided substantial assistance prior to sentencing then a 5K1.1 motion must be filed to reward the defendant for that assistance. Prior assistance can not be addressed by a Rule 35(b) motion. Once again, the Tenth Circuit misses the point in their Order and Judgment. They ignore the opinions of the First and Fourth Circuit and instead focus on the fact that Mr. Stringfellow fled the jurisdiction making him unavailable to testify at trial. It is important that this Court address the issues presented by Mr. Stringfellow in order to assure that his due process rights, along with others who may provide substantial, although not complete assistance in the future.[2]

The United States Court of Appeals for the District of

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[2] In *United States v. Howard*, 902 F.2d 894 (11th Cir. 1990), the Eleventh Circuit held that a sentencing court is obligated to rule on a section 5K1.1 motion at the time of sentencing and that by postponing the ruling, the district court is in violation of the law.

Columbia takes a different approach from those discussed above. In *United States v. White*, 71 F.3d 920 (D.C. Cir. 1995), the D.C. Circuit holds that a district court may postpone the filing of a 5K1.1 on the basis that the government may later file a Rule 35(b) motion. In an opinion which is in direct conflict with *Drowns* and *Martin*, the *White* court stated that "[t]he core of White's argument is that it is unfair for the government to keep the carrot dangling in front of him. Fair or not, it is not unconstitutional; no more so than the government's initial dangling of the carrot." *Id.* at 924. Other circuits have clearly held that the "dangling of the carrot" is a violation of the defendant's right to due process. It is important that this Court clarify what is constitutional when in comes to the important rights both given and taken away when a defendant enters into a plea agreement, particularly, when the defendant has cooperated with the government, often at great risk to himself

and his family.

The Order and Judgment of the Tenth Circuit is also inconsistent with the basic laws of contract. Plea bargains are like contracts, and when the "plea is predicated in any significant degree on a promise or agreement, such promise or agreement must be fulfilled to maintain the integrity of the plea. . . . Plea bargains, like contracts, cannot normally be unilaterally broken with impunity or without consequence." *United States v. Reardon*, 787 F.2d 512, 516 (10th Cir. 1968)(*citations omitted*). *See also Allen v. Hadden*,57 F.3d 1529 (10th Cir. 1995). The typical remedy for the violation of a contract is to invalidate the contract in its entirety, not to enforce the contract against one party. By allowing the government to withdraw the benefits of the plea agreement directed at the defendant, yet still enforce the plea agreement against him, the Tenth Circuit is in violation of the most basic principles of contract law. The defendant should

clearly have been allowed to either withdraw his plea, or the plea agreement should have been enforced in its entirety, regardless of whether or not the defendant was in violation of the agreement. This Court clearly addressed this issue in *Santobello v. New York*, 404 U.S. 257 (1971) when Chief Justice Burger held that:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, **such promise must be fulfilled.**

Id. at 261 (*emphasis added*).

Chief Justice Burger further addressed the issue of the remedy

in such a circumstance when he held that:

> The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.

Id.

There is a significant public interest which should be taken into account along with the due process considerations in assuring the fair administration of motions for downward departure pursuant to 5K1.1, particularly given the near complete discretion that the government possesses in determining when such a motion will be filed. It is a

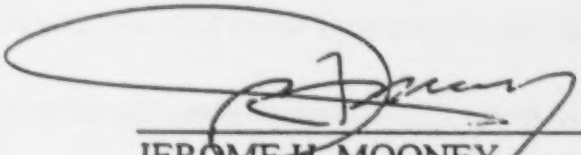
fundamental rule in our system of justice that a defendant should receive recognition, and possibly even be rewarded for conduct that has been engaged in after the time of arrest which substantially aides the government. When the defendant engages in such conduct, often at great risk, other bad acts committed by the defendant should not result in the complete disregard of the helpful conduct. The government's acts in this case undercut substantially the reasoning and purpose behind United States Sentencing Guideline 5K1.1. Defendants should be encouraged to aide the government when they are able to do so, and to allow the government to not only ignore the defendant's good conduct, but to enforce a plea agreement that the defendant entered into almost solely on the basis that such conduct would be recognized, is a violation of the defendant's right to due process. This Court should address these issues in order that the reasoning behind both plea agreements in general and 5K1.1

motions specifically may be upheld. Because the determination of these issues are necessary in order to preserve both essential constitutional principles and public interest, certiorari should be granted to resolve the questions presented.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED this 3rd day of October, 1996.



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APPENDIX

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	
	:	No. 95-1397
v.	:	(D.C.No.93-CR-9)
	:	Dist.of Colorado
CORY STRINGFELLOW aka Michael John Fortini,	:	
Defendant-Appellant.	:	

ORDER AND JUDGMENT*

Before PORFILIO, HOLLOWAY, and LUCERO, Circuit Judges.

Cory Stringfellow pled guilty to conspiracy to possess with intent to distribute and to distribute 10 grams or more of Lysergic Acid Diethylamide (LSD) in violation of 21 U.S.C. § 846 and 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).. On appeal, Mr. Stringfellow claims the district court

erroneously allowed the government to violate his plea agreement. Mr. Stringfellow also argues he was denied effective assistance of counsel. We affirm the judgment of the district court and dismiss without prejudice the Sixth Amendment claim.

In January 1993, Mr. Stringfellow was arrested and charged in a four count indictment. Count 1 charged him with conspiracy to possess with intent to distribute and to distribute 10 grams or more of LSD in violation of 21 U.S.C. § 846 and 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Counts 2, 3, and 4 charged him with distribution and aiding and abetting the distribution of 10 grams or more of LSD in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2.

Pursuant to a plea agreement, Mr. Stringfellow agreed to plead guilty to Count 1. In exchange, the government promised the remaining counts would be dismissed if the defendant "fully and truthfully cooperate[d] with the Government and law enforcement authorities, which cooperation will include debriefings and truthful testimony before federal grand juries and trial juries whenever called upon or subpoenaed."

The government further agreed to file a U.S.S.G. § 5K1.1 departure motion prior to sentencing, recommending a sentence of imprisonment of 84 months, "[p]rovided that the defendant fully, truthfully, and completely cooperate[d] with the Government and law enforcement authorities." Finally, the government agreed, if the defendant

"continue[d] to cooperate," the government would consider filing a motion pursuant to Fed. R. Crim. P. 35(b) within the year. The plea agreement contained a stipulation that defendant's role in the offense would not be considered at sentencing.

On September 16, 1993, the government filed its 5K1.1 motion. The very next day, apparently acting upon a concern for his safety, Mr. Stringfellow fled the country and failed to appear at his sentencing hearing. Although the district court issued an arrest warrant, the defendant eluded capture until March 15, 1995, when he was arrested in Liverpool, England. He waived extradition and returned to the United States where sentencing was rescheduled for June 23, 1995.

On June 14, 1995, the government filed a motion to withdraw its previously filed and pending 5K1.1 motion. That motion was not ruled upon. After a hearing testimony at the sentencing hearing, the district court sentenced Mr. Stringfellow to 188 months imprisonment with 4 years supervised release.

Mr. Stringfellow now appeals. He contends the district court committed reversible error in allowing the government, in contravention to the plea agreement, to withdraw its motion for departure under 5K1.1 and to argue for an adjustment based upon defendant's role in the offense. He also asserts he received ineffective assistance of counsel.

Mr. Stringfellow contends the government violated his plea agreement by

withdrawing the 5K1.1 motion. He asserts the motion, filed one day before his original sentencing date, was appropriate because he had rendered substantial assistance prior to sentencing. He points out the government's original motion stated he had provided substantial assistance in the investigation of others who had committed offenses and had given truthful, complete, timely, and reliable information that was useful and important to the government in a continuing investigation into the criminal activities of others. Asserting the government conceded these facts by filing the 5K1.1 motion, Mr. Stringfellow argues the government could not withdraw the motion merely because he fled. Mr. Stringfellow contends the 5K1.1 motion was an essential part of his plea

agreement and was the major inducement behind his guilty plea. Therefore, he argues, the district court erred in allowing the withdrawal.

In reply, the government contends 5K1.1 motions contemplate future cooperation in addition to cooperation prior to sentencing. According to the government, Mr. Stringfellow's plea agreement required his assistance in continuing investigations, and he failed to provide such assistance because he fled the country. Therefore, the government contends Mr. Stringfellow is not entitled to benefit from the 5K1.1 motion merely because the motion was filed on the day before Mr. Stringfellow's initial sentencing was to have occurred. Additionally, the government argues Mr.

Stringfellow's failure to object to the withdrawal of the 5K1.1 motion indicates he agreed the motion was no longer warranted.

We initially observe the district court never ruled upon the motion to withdraw. For a reason not apparent from the record, the court assumed the motion was withdrawn by the time of sentencing and neither side disagreed. In fact, Mr. Stringfellow not only failed to object to the withdrawal, he also filed to point out to the court its erroneous assumption.

Whether the government's conduct violated the plea agreement is a question of law which we review de novo. ***Allen v. Hadden***, 57 F.3d 1529, 1534 (10th Cir.), *cert.denied,* 116 S.CT.. 544 (1995). In considering whether the plea agreement was violated, we construe the terms of the plea

agreement "according to what [the defendant] reasonably understood when he entered his plea." ***United States v. Johnson***, 973 F.2d 857, 860 (10th Cir. 1992)(quoting ***United States v. Jiminez***, 928 F.2d 356, 363 (10th Cir.), *cert.denied*, 502 U.S. 854 (1991)). We have stated "[w]here a plea is predicated in any significant degree on a promise or agreement, such promise or agreement must be fulfilled to maintain the integrity of the plea. Plea bargains, like contracts, cannot normally be unilaterally broken with impunity or without consequence." ***United States v. Greenwood***, 812 F.2d 632, 637 (10th Cir. 1987)(citations omitted)(quoting ***United States v. Reardon***, 787 F.2d 512, 516 (10th Cir. 1986)). Based on the facts presented, we conclude the government did not

unilaterally breach the plea agreement and certainly it did not act with impunity.

Mr. Stringfellow argues he cooperated with the government up to the time of sentencing and was thus entitled to the 5K1.1 motion. He admits the plea agreement required him to testify at the trial of his co-conspirator and that he was unavailable to do so. However, he contends this issue is relevant only under Fed. R. Crim. P. 35(b), which he claims governs substantial assistance rendered by a defendant subsequent to sentencing.

Several cases in other circuits support Mr. Stringfellow's contention the 5K1.1 motion applies to assistance provided prior to sentencing. ***See, e.g., United States v. Martin***, 25 F.3d 211, 215-16 (4th Cir. 1994)("[T]he parties concede that ...

5K1.1 grants the sentencing judge the authority to grant a downwart departure *only* for substantial assistance provided to he government *prior* to, or at the time of, sentencing."); ***United States v. Drown***, 942 F.2d 55, 59 (1st Cir. 1991)("The language, structure, context, and operation of [5K1.1] leaves little doubt that the guideline provision, section 5K1.1, was designed to recognize, and in an appropriate case to reward, assistance rendered *prior* to sentencing."); ***United States v. Howard***, 902 F.2d 894, 896 (11th Cir. 1990). ("Section 5K1.1 is a sentencing tool; at the time of the original sentencing, the court may sentence the defendant below the guideline range on a motino from the government.... Rule 35(b) operates *after* sentence has been

imposed...to reflect substantial assistance rendered after imposition of teh intiial sentence.").

However, we do not believe these cases apply here. In ***Martin*** and ***Drown***, for example, the government agreed to file a 5K1.1 motion, but attempt to defer the filing of the motion until after it had determined the defendant's cooperation was complete -- sometime after sentencing. On appeal, the Fourth and First Circuits staed the government could not file a 5K1.1 motion subsequent to sentencing. Because the government, at the sentencing hearing of both defendants, agreed the defendants had rendered substantial assistance, the Fourth and First Circuits held the goernment had violated the respective plea agreements.

In this case, not only did the government file the 5K1.1 motion in accordance with the agreement, there is no indication it would have withdrawn the motion had Mr. Stringfellow appeared at his original sentencing hearing. Thus, the government fulfilled its part of the bargain, but before the motion could take effect and the contract could be executed, the defendant failed to carry out his part of the bargain. It is unassailable that by absconding Mr. Stringfellow insured he could not e called upon to testify. In so doing, he may have protected his personal safety, but nonetheless he failed to "fully, truthfully, and completely cooperate with the Government and law enforcement authorizes."

Moreover, regardless of whether the 5K1.1 motion is relevant to acts that took place prior to he sentencing or applies to subsequent acts as well, we conclude the government was justified in attempting to withdraw the motion. We have no doubt that had the government waited until the day of the original sentencing hearing, it would not have filed the 5K1.1 motion when Mr. Stringfellow failed to appear. Therefore, we conclude the defendant is not entitled to benefit from his flight merely because the government filed the motion one day prior to the hearing, reasonably anticipating Mr. Stringfellow's appearance.

With the bravado borne of auintessenial chutzpah, defendant cites ***Santobello v. New York***, 404 U.S. 257 (1971), and contends he is entitled to the

benefits of a 5K1.1 departure notwithstanding his breach of the plea agreement. According to defendant's theory, ***Santobello*** says the government's breach entitles him to specific performance of the plea agreement or to withdraw his guilty plea. He stands ***Santobello*** on its head, however, because he remedy it provides is available only to the blameless defendant who has been subjected to a plea agreement breach by the government. Nothing in the opinion suggests the remedy should be applied to a defendant who has failed to perform the promises he made as consideration for the government's agreement.

Overlooking his own defalcation, Mr. Stringfellow also contends the plea agreement was violated because the

government argued at sentencing that the defnedant should receive a two-point upward adjustment to his base offense level for his role in the offense. He asserts the government stipulated in the plea agreement there would be no upward adjustment for the part played by the defendant. Therefore, he argues the district court erred in allowing he goverment to breach the plea agreement.

At the sentencing hearing held on June 23, 1995, Mr. Stringfellow explained his invovlement in the LSD operation. In response, the court asked whether he denied a statement made by his co-conspirator, John Stuart, that "[Stuart] had taken several trips out of state for Stringfellow to pick up cash and transport LSD." Mr. Stringfellow answered, "Yes, that is

false." The court then asked the government whether it was prepared to offer evidence on this matter. The prosecutor responded, "I wasn't prepared to address this specifically, but I don't recall Mr. Stuart doing a whole lot for Mr. Stringfellow...." The prosecutor then briefly explained the evidence of the relationship between Mr. Stringfellow and Mr. Stuart.

Exercising caution, the court decided to continue sentencing until July 21, 1995, to permit John Stuart to testify about Mr. Stringfellow's involvement in the LSD scheme. However, at that second sentencing hearing, Mr. Strinfellow agreed to stipulate that if Mr. Stuart were to testify, he would state Mr. Strinfellow's involvement was more extensive than Mr.

Stringfellow originally admitted. Based on this evidence, the court, sua sponte, adjusted Mr. Stringfellow's sentence to account for his role in the offense.

Mr. Stringfellow relies on ***United States v. Boatner***, 966 F.2d 1575 (11th Cir. 1992), to support his argument that the government breached the plea agreement. In ***Boatner***, the defendant agreed to plead guilty in exchange for the government's stipulation that only two ounces of cocaine would be considered for sentencing purposes. However, at the sentencing hearing, the government argued that since the time of the stipulation it had discovered additional informaiton aboutthe defendant and could prove he had participated in a much larger drug transaction. Using the information

provided by the government, the district court sentenced the defendnat to 8 years imprisonment. On appeal, the Eleventh Circuit reversed and remanded, holding:

> The solemnization of a plea agreement does not preclude the goverment from disclosing pertinent information to the sentencing court. That rule notwithstanding, the government can enter into a binding agrement with a defendant to restrict the facts upon which the substantive offense is based. Thus, the plea agreement's stipulation that only two ounce of cocaine would serve as the factual predicate for determining Boatner's senence obligates the government to strict compliance .... [W]e conclude that the stipulation limiting the amount of cocaine involved in Boatner's offense was violated and the plea agreement breached when the government introduced evidence through the presetnence investigation report showing that Boatner's drug dealings had involved over three kilograms of cocaine.

Id. At 1578 (citations omitted).

However, the government's actions in ***Boatner*** are distinguishable from the circumstances of this case. Here, the government did not attempt to introduce belatedly discovered information about the defendant. This is not a case where the goverment discovered facts indicating its prosecutorial discretion was not properly exercised and attempted to recover by reneging on its promise. ***See, e.g., United States v. Cooper***, 70 F.3d 563, 566-67 (10th Cir. 1995). Rather, the government in this case, briefly answered the court's questions after the court received unsatisfactory answers from the defendant. ***See, e.g., United States v. Hand***, 913 F.2d 854, 856 (10th Cir. 1990)("A promise to 'recommend a reduction' [in defendant's sentence] is not a promise to stand mute in

the face of incorrect or misleading testimony offered before the trial court."); ***United States v. Stemm***, 847 F.2d 636, 639 (10th Cir. 1988)("Disclosure of information as to the nature of the offense and each defendant's role is proper and within the Government's duty to provide, despite a promise that the Government would make no recommendation as to sentence."). Finally, the defendant stipulated to facts sufficient to support the sentence enhancement and did not contend in the trial court that the stipulation was contrary to the provisions of the plea agreement. We conclude this issue is wholly without substance.

Mr. Stringfellow argues, briefly, he received ineffective assistance of counsel because his attorney failed to request a

hearing after the government withdrew its 5K1.1 motion. Trial counsel also did not object to the government's withdrawal of the motion, and therefore failed to preserve the issue for appellate review. Citing the standard used to determine ineffective assistance of counsel set out in ***Strickland v. Washington***, 466 U.S. 668 (1984), Mr. Stringfellow contends these trial "errors" were so serious that his counsel was not acting as counsel. Thus, Mr. Stringfellow argues his Sixth Amendment rights were violated.

The rule in this circuit is that claims of constitutionally ineffective counsel should be brought on collateral review in the first petition filed under 28 U.S.C. § 2255. ***United States v. Galoway***, 56 F.3d 1239, 1242 (10th Cir. 1995).

Accordingly, "claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed. ***Id.*** at 1240; ***United States v. Coleman***, 9 F.3d 1480, 1487 (10th Cir. 1993), *cert.denied*, 114 S.Ct. 1234 (1994).

Nevertheless, the court will hear on direct appeal some "rare claims which are fully developed in the record." ***Galloway***, 56 F.3d at 1242. Here, Mr. Stringfellow contends the record is sufficiently complete to determine the ineffectiveness claim without further hearing because his counsel's ineffectiveness is clear from the record of the two sentencing hearings. However, we have stated, "even if the record appears to need no further development, the claim should still be presented first to the district court in

collateral proceedings ... so the reviewing court can have the benefit of the district court's views." ***Id.*** at 1240. Accordingly, this claim is dismissed without prejudice.

AFFIRMED

ENTERED FOR THE COURT

John C. Porfilio
Circuit Judge

UNITED STATES DISTRICT COURT
District of Colorado

UNITED STATES OF AMERICA,	:	
v.	:	
	:	Case No. 93-CR-9-N
CORY STRINGFELLOW	:	
Defendant.	:	

JUDGMENT IN A CRIMINAL CASE
For Offenses Committed On or After 11/1/87

The defendant, CORY STRINGFELLOW, was represented by Richard Banta, Court Appointed.

The defendant pleaded guilty to cont(s) One. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section: 21 USC 846 and 21 USC 841(a)(1) and (b)(1)(B)

Nature of Offense:

Conspiracy to Possess with Intent to Distribute and to Distribute 10 grams or more of Lysergic Acid Diethylamide (LSD)

Date Offense Concluded: 9/19/92
Count Number(s): One

As pronounced on July 21, 1995, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s) One, which shall e due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 2nd day of September, 1995.

/s/
EDWARD W. NOTTINGHAM, Judge
United States District Court

Defendant's SSN: 528-43-6332
Defendant's Date of Birth: October 15, 1969
Defendant's Address: 2850 Hermosa Way, Salt Lake City, Utah 84124

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 188 months.

The Court makes the following recommendations to the Bureau of Prisons: Defendant receive credit for 135 days spent in Federal custody.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall not possess a firearm or destructive device; shall comply with the standard conditions that have been adopted by this Court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. Defendant shall provide the Probation Officer access to any requested financial information.

3. Defendant shall not possess or attempt to acquire a U.S. passport.

4. Defendant shall not incur new creditor open additional lines without the approval of the Probation Officer.

5. Defendant shall participate in a program of testing and treatment for drug abuse as directed by the Probation Officer until released from the program by the Probation Officer.

6. Defendant cannot travel outside the jurisdiction of the supervising district without prior permission of the Court.

7. No fine is imposed because defendant has no ability to pay a fine.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written

report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling ,training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall

permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

13) The defendant shall provide the probation officer with access to any requested financial information.